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No. 510

IN THE

Supreme Court of the United States

October Term, 1958

JOHN SYRES and LOUIS J. WARRICK,
Petitioners

v.

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL.,
Respondents

BRIEF OF UNION RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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This reply in opposition to the grant of certiorari is filed by respondent Oil Workers International Union, Local 23 (now Oil, Chemical and Atomic Workers International Union, Local 4-23) and E. R. McAdams, Chairman of the Workmen's Committee of the Local. The only other respondent, Gulf Oil Corporation, our alleged "co-conspirator", will file its own reply.

The caption of the Petition as printed is suggestive that Local 254, Oil Workers International Union is a party here. This Local Union, originally a plaintiff below, voluntarily withdrew as a party-plaintiff (Petition, p. 4; R. 770).

Another individual party, one F. A. McDuffie, originally a defendant, was voluntarily dismissed from the case by plaintiffs (R. 770).

With these corrections as to the parties, these union respondents accept petitioners' preliminary statement and statement of jurisdictional requisites, as well as the statutes involved. The decision below is now reported at 257 F. 2d 479. Rule 23(a) is reprinted herein at p. 31.

Questions Presented

Petitioners' two tendered questions reasonably identify the novel theory here urged as a ground of reversal of the judgment below. The two questions should be read with petitioners' ultimate contention: "No particular employee is seeking a particular recovery, but in whatever recovery there may be there will be a ratable participation." (Petition, p. 9.)

These respondents believe that a more accurate statement of the question presented is as follows:

In this suit for damages brought by two individuals as a class action under Rule 23(a) on behalf of the Negro employees in a plant, where the cause of action alleges a conspiratorially discriminatory contract, was recovery of damages properly denied where no evidence of financial injury to any individual member of the class was adduced?

A District Court judgment in favor of defendants was affirmed by the Court of Appeals because of the total lack of evidence of damages. The point was duly preserved at the trial by proper motions for instructed verdict under Rule 50 (b) which the court took along with the case as the rule provides. (R. 886, 888) Following a jury verdict for defendants on the question of liability, and judgment thereon, respondents advanced their point on damages as an additional ground of affirmance of the judgment plainly apparent in the record. *Jaffke v. Dunham*, 352 U.S. 280 (1957); *Story Parchment Company v. Patterson*, 282 U.S. 55 (1931); *Anderson v. Atherton*, 302 U.S. 643 (1937). This was sustained.

On the matter of liability, the question of conspiracy as pleaded by petitioners was submitted to the jury. The court's charge was in the image of the *Steele*[1] decision. Jury verdict on liability was in favor of defendants. Petitioners, as plaintiffs and appellants below, did not move for any form of instructed verdict under Rule 50(b), and did not complain at any point of the sufficiency of the evidence to support the jury's verdict. *Irvin Jacobs & Co. v. Fidelity & Deposit Company of Maryland* (C.A. 7, 1953), 202 F. 2d 794; *Harriman v. Mitland Steamship Line, Inc.* (C. A. 2, 1953), 208 F. 2d 564. Indeed the cause was submitted to the jury along the lines of petitioners' requested instruction on conspiracy. (R. 881.) Their appeal below consisted of an objection to one aspect of the court's charge and to the admission of two or three items of evidence. Respondents represent that none of these points reflected reversible error. However, the Court

[1] Steele v. L. & N. R. Co., 323 U.S. 192 (1944).

of Appeals, resting the affirmance on the question of damages, held "other claimed errors are, therefore, immaterial." (Petition, p. 22.)[2] In this case, therefore, there exist grounds for affirmance of the judgment outside of the question tendered here by these petitioners.

Statement

Supplementing petitioners' statement, and at points correcting, these respondents submit the following facts:

This suit was tried to a jury as a suit for damages incurred by Negro employees of the Gulf Refinery at Port Arthur, Texas, the claim being that the damages were incurred during the life of an 18-months collective bargaining contract, dated April 17, 1954. On March 14, 1956, a new collective bargaining contract covering the same employees was executed between Gulf and the union. This latter contract was not attacked by petitioners as discriminatory or otherwise illegal although the trial below was held beginning October 1, 1956, more than six months later.

The case was originally filed for injunction and declaratory judgment against the April 17, 1954, contract in addition to the claim for damages. After the expiration of the old contract and the execution of the new, the

[2] In the last paragraph of the opinion (Petition p. 22) appears the sentence: "None of the excluded evidence would have supplied the insufficiency in the proof of damages." This statement is entirely inadvertent. No evidence was excluded in this case and no complaint as to such a matter has ever been made by petitioners at any point. The balance of the Court's opinion, we think, demonstrates the validity of this correction which is noted here to avoid confusion.

District Court dismissed all "causes of action and claims for relief" save and except those relating to "plaintiffs' claim for monetary damages." Petitioners did not complain of that ruling, did not amend their pleadings, but elected to go to trial for damages *only* incurred during the period the 1954 contract was effective.

As will be seen, the essence of the case as tried was a claim that the demanded integration was not rightly accomplished nor timely perfected, that the 1954 contract was a step in the wrong, not the right, direction, and that damages should be paid for these claimed errors.

Petitioners here state that they offered no evidence of monetary damage to any individual in the class, advancing their theory of "averages" and "pro rata participation" as a satisfactory substitute. While respondents will demonstrate that there is no merit to this contention and that the absence of proof of damages was fatal to the case, we also think it relevant to call attention to the fact that the Petition does not disclose the factual background in which this contention is raised. The background illustrates further the error of petitioners' contentions because this record shows that integration, when demanded by the Negroes, was promptly put into effect by a plan which failed for the precise reason of lack of qualifications by some of the individual Negroes who were placed on the skilled jobs of the company. It proved necessary to apply qualification standards equal to those demanded of and exhibited by the white employees by a substitute plan which involved many intricate compromises between the company and union bargainers. Furthermore, frankly, this respondent union, believing that it has properly and effectively shouldered its statutory responsibility, does not

wish it to be assumed *sub silentio* that this is but another story of dereliction or evasion by a certified bargaining agent which is insensitive to the rights of the minority and is hiding behind points of law.

To the contrary, believing that the light of day on the facts strengthens respondents' legal and equitable position, we have reproduced a factual summary of the case with appropriate record references as it is set forth in our brief in the Court of Appeals. See pp. 19, et seq., *infra*.

In short, since 1901 and for 43 years before the coming of the union, Gulf has hired Negro employees in the labor classifications and white employees in the operating and mechanical jobs. In 1943, the union came in the form of two jointly certified local unions, Locals 23 and 254, whose memberships are, respectively, white and Negro. These two were and are the joint owners of the bargaining rights.[3] Respondents proved and petitioners conceded at the trial that from the 1943 beginning to the end of 1953, the insistent policy of Local 254 (the Negro union) was the maintenance of the existing division of the jobs. Without doubt the early origins of this policy lay in the desire to maintain the relative job distribution for the benefit of the Negroes and to forestall and prevent the then current sordid episodes which existed in the railroad industry and which culminated in the 1944 decision in *Steele v. Louisville & N. R. C.*, 323 U.S. 192.

The position so taken by Local 254 was effectively implemented by it in the exercise of its rights as jointly certified bargaining agent.

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[3] In the Matter of Gulf Oil Corporation (Port Arthur Refinery) and Oil Workers International Union, Locals 23 and 254, Cause No. 16-R-557, 58 N.L.R.B. 978.

But old patterns break down. In 1953, agitation began among some Negro employees for a new system. Negotiations of December 23, 1953, led to an amalgamation of the two groups on January 5, 1954. Answering the demand for integration, and acting by authority of Local 23, respondent E. R. McAdams advised Gulf that the union "expected the company to fill all jobs according to the contract." The meaning of the demand was a reversal of previous policy. Gulf called for a meeting seeking clarification of the demand which changed the practice of fifty years, ten of which, it remarked, had been under union contract. Gulf, being satisfied that the union's answers meant "complete integration", promptly agreed. It so happened that the labor contract at that time was open for negotiation and was effective on a day-to-day basis. Therefore, Gulf was in position to try the new system since it was not then tied to a lengthy contract. The new program was initiated as demanded, but over a period of four weeks two unexpected problems developed: (1) A severe unrest within the plant accompanied by various ugly incidents which caused apprehensions concerning safety of the plant, and (2) job vacancies were being filled by unqualified bidders. For these reasons, Gulf discontinued the filling of vacancies, acting on its own.

The first problem was met and overcome by the union through an educational program.

The second problem proved more complicated than the union had imagined. Gulf demanded time to find a system of selectivity which would assure it of qualified bidders for the jobs. This was so because the company's minimum qualifications for employees to enter the operating-

mechanical division were a high school education and the ability to pass certain standard intelligence tests. On the other hand, Negro employees had never been selected on that basis, their qualifications being simply an ability to read "No Smoking" signs. Pending study and solution, Gulf was willing, and the 1954 contract did provide, that 76 selected jobs theretofore a part of the operating-mechanical division would be made available to the bid of Negro employees. But, Gulf would not go further *that day* pending such study. Gulf further agreed that the ten Negro employees who had actually bid into and had remained in the operating-mechanical division would not be disturbed. It gave full assurance that it was committed to the principle of integration and merely needed time to study the problem.

The union then proposed that the 1954 contract include Stipulation 33 by which it was specially agreed that continuing meetings would be held concerning solution to the racial problem. To this the company agreed and the record shows that the continuing study was fruitful.

From that point forward, the record shows active movement by Local 23 in terms of proposals and counter-proposals to the company and to Local 254. The record also shows reticence and deliberate withholding of co-operation by Local 254. The methods and solutions which were finally found are described in the Appendix. No complaint is made of these.

The record shows that this was the first plant in the Gulf Coast area of the oil industry to make this reversal and the solutions which were eventually designed were not quickly discernible for the lack of industry experience.

Our purpose in inviting this Court to review the collated evidence and history in the Appendix is to show the Court that Stipulation 33 meant exactly what it said; that Local 23 turned to the task at hand within ten days of the April 17, 1954, contract, before this litigation was filed, and did not rest until the solution was found; that the company, for its part, carried out its promises fairly and demanded only due consideration of relevant factors necessary to the operation of its business; that petitioners, as well as Local 254, obstructed progress by refusing to meet in the beginning, by refusing to lend their economic and mental powers to the problem, by refusing to take a position in the bargaining, and by even scuttling the efforts of a duly authorized committee of Local 254 to bargain to a successful solution.

Although it is a matter of common knowledge, the enormous complexity of this modern refinery was proved in the record. In the exercise of its unilateral right of employment to fill its skilled jobs, Gulf has established minimum educational and mental qualifications and in addition has strenuously defended its right to a probationary period during which it made practical observation of the potential of these employees. The reversal of this policy of selectivity and probation is described in the Appendix and the necessary compromises between the company and the union are set out. Arms length bargaining became necessary, but in the end the problem was solved to the reasonable satisfaction of all. Every facet of the negotiations and compromises concerned relevant factors as defined in *Steele*. The record is devoid of ugly, telltale signs that either the company or the union was in fact motivated by irrelevant or invidious motives. The

76 jobs immediately made available to the Negroes were those in which the company could readily waive qualifications, and represented a step forward and a down payment on the ultimate result.

Like Voltaire, these respondents defend violently petitioners' right to maintain this litigation and to believe in the just and right of it. But from respondents' standpoint, we think the case was properly decided by the verdict against which no attack has been made. Whether we adopt in this case the conception of "deliberate speed" as laid out in the *Brown* case,[4] or whether some other test for this class of cases be found, it is self evident that the negotiators must in some way be given some reasonable time to extricate the relevant from the irrelevant in reversing established practices in the interest of conforming to the statutory obligations. At least this is true where the established practices exist by the active procurement of a minority group which is joint owner of the statutory bargaining power as distinguished from disfranchised or disregarded persons as has been the case in the decisions thus far.

Reasons For Denying The Writ

1. Nothing in the opinion below weakens the statutory obligation of a bargaining representative under the National Labor Relations Act, as amended, and no question is raised as to effective enforcement of the duty by injunction, declaratory judgment, damages or any other suitable remedy or redress known to law. This respondent union has at every point in this affair and in this litigation

[4] **Brown v. Bd. of Education of Topeka, Kansas,** 349 U.S. 294 (1954).

acknowledged its plain duty as declared in *Steele* and related cases. The acknowledged existence of the duty has been the starting point of both courts below.

2. Nothing in the opinion below impairs the class action under Rule 23(a). The employment of this useful procedural device has been widely and uniformly approved in racial discrimination cases by the lower courts[5] and by the Fifth Circuit.[6]

3. The class action, formerly as a creature of equity and now as Rule 23(a), is a procedural device to facilitate litigation which otherwise would be embarrassed by sheer numbers or sometimes by necessary absentees from the jurisdiction of the court. *Moore's Federal Practice*, 2d Edition, Sec. 23.02; 23.03. As a procedural device which allows the case to proceed, it does not dispose of the normal elements of proof necessary to establish the right to recovery. Neither does it permit the class representative to decide to alter the rights of the members of the class by homogenizing the recoverable damages of each individual in the class. If it did so permit, constitutional problems of due process more severe than those now present would follow. Cf. *Hansberry v. Lee*, 311 U.S. 32.

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[5] **Johnson v. Board of Trustees of U. of Ky.** (E.D. Ky. 1949), 83 F. Supp. 707; **Kansas City, Mo. v. Williams** (C.A. 8, 1953), 205 F. 2d 47, cert. den. (1953), 346 U.S. 826; **Vann v. Toledo Metropolitan Housing Authority** (N.D. Ohio), 113 F. Supp. 210; **Constantine v. Louisiana Institute** (W.D. La. 154), 120 F. Supp. 417; **Hunter v. Atchison T. & S.F. Ry. Co.** (C.A. 7, 1951), 188 F. 2d 294, cert. den., 342 U.S. 819; **Wilson v. Beebe** (D.C. Del. 1951), 99 F. Supp. 418; **Gonzales v. Sheely** (D.C. Ariz. 1951), 96 F. Supp. 1004.

[6] **Bryce v. Byrd** (C.A. 5, 1953), 201 F. 2d 664; **Avery v. Wichita Falls Ind. School Dist.** (C.A. 5, 1957), 241 F. 2d 230; **Orleans Parish School Board v. Bush** (C.A. 5, 1957), 242 F. 2d 156.

4. Petitioners are plainly in error in the contention that pro rata recovery is allowable by force of the rule. Assuming arguendo that a discriminatory contract existed, admittedly an individual qualified Negro employee could sue for his damages and prove that upon his qualifications and seniority he would have occupied a certain job of improved pay for the duration of the contract. By what theory could his right to the proper amount of his damage be altered in favor of division of the amount with another of the class who had neither the qualifications nor the seniority to occupy a higher job? This is the effect of the "averaging" procedure which petitioners advance.

5. The Court of Appeals was right in recognizing that wages, promotions and failures to promote are peculiar to the individual employee and are separately and individually earned. (Petition p. 20). Since the very purpose of the statutory duty is to remove race as an item of consideration and to allow each man to stand upon his own merits, it follows that any individual's monetary damage is the difference between what he did earn and what he would have earned upon his individual merit, as the court held (Petition p. 22).

Argument

Petitioners say that no case here or in any other federal court has raised this or a substantially similar question. (Petition p. 4). Respondents likewise find no such case. The reason, we think, is because petitioners' contentions are entirely at a tangent to sound doctrine under Rule 23.

Rule 23 has developed well since its adoption. A reading of Professor Moore's annually supplemented treatise on

Federal Practice, 2nd Edition, discloses no complaint and no instance in which Rule 23, when needed, has been held unavailable in at least one of its subsections of true, hybrid or spurious to facilitate causes within its ambit. A prominent statement among the lower courts is that of the 8th Circuit in *Montgomery Ward v. Langer* (1948), 168 Fed. 2d 182:

> "By Rule 23 the Supreme Court has extended the use of the class action device to the entire field of federal civil litigation by making it applicable to all civil actions. The usefulness of the device in its new environment will depend largely upon the attitude of the courts. If the device is to be loaded down with arbitrary and technical restrictions, it will serve no very useful purpose in the enlarged field. If, on the other hand, the courts will disregard the ancient and often arbitrary restrictions between actions at law and suits in equity and will permit the rule to operate in all cases to which it justly and soundly may be applied, it will serve its intended purpose. Like most procedural devices, its usefulness is susceptible to being nibbled away by those who regard it as an unwelcome stranger in an unsuitable environment."

In the racial discrimination cases its acceptance has been universal so far as we can find.[7]

An important caveat that goes with the rule, however, is the concern for fairness and due process to the absent members of the class. Much of the problem has been answered by the universal holdings, that res judicata does not apply to impersonam aspects of hybrid or to any

[7] Footnotes 5 and 6, supra. And see summary by the 8th Circuit quoted on this page above.

aspect of spurious class actions.[8] In true class actions, res judicata is said to apply where the precautionary aspects of the class action device are followed such as adequately of representation and identity of interest between representative and class. *Hansberry v. Lee*, 311 U.S. 32 (1940). From the standpoint of plaintiffs, if the representatives of the class win the case, no problem of unfairness to any absentee arises because the position of one and all has been enhanced by the judgment as to any matter in which the interest of each member of the class is identical. It is the possible litigation casualty which causes the problem. Here, due process is thought to be satisfied by the fact that there is indeed a day in court where rights are advocated and tried by representatives who by definition are of equal zeal and motive with each absent member. If the assumed definition of the representative proves untrue in fact, the departure from due process is so great as to authorize even federal interposition against state decisions which attempt to bind the absentees to the actions of the representatives. *Hansberry v. Lee*, supra.

Petitioners here approach the subject from the opposite direction. They assert the right to meld the monetary recovery of some individuals who are assumed to have been damaged into a pot to be shared by others who individually sustained no monetary damage. With this right in hand (simply acquired by their own pleadings) petitioners then use it to dispense with the need for any proof of monetary damage to any individual. Obviously this cannot be.

There is no merit to the makeweight argument that here such a rule is a necessity. In this case, each and every mem-

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[8] Moore's Federal Practice, 2d Edition, Sec. 23.11, pp. 3456-3472.

ber of the class works within the very county where the cause was tried and is of known identity and seniority date. Every job opening is known by its date and place since it was occupied by someone. The calculation of monetary damages as to any individual is a fairly precise matter.

The decisions below have regarded class actions in racial discrimination cases as proper spurious class actions under subdivision (3) of Rule 23a. A quotation from an opinion of the 8th Circuit in *Kansas City, Mo. v. Williams*, 205 Fed. 2d 47, at pp. 51-52, cert. denied, 346 U.S. 826, illustrates the view:

> "It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply 'because someone else may be hurt', but he 'must present facts sufficient to show that his individual need requires the remedy for which he asks.' McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 151, 162, 164, 35 S. Ct. 69, 71, 59 L. Ed. 169. But where he is able to establish his right to individual relief on this basis, he may also under certain conditions ask that the benefit of that adjudication be extended to others, where they constitute a class standing generally in the same legal situation, where they are so numerous as to make it impracticable to bring them all before the court, and where the granting of such relief seems likely to serve some useful legal purpose—for example, preventing a multiplicity of suits.
>
> "Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed on a class basis or as a group policy, such as a discrimination generally because of

race, they are no less entitled to be made the subject of class actions and class adjudication under rule 23, Federal Rules of Civil Procedure, 28 U.S.C.A., than are other several rights. And the District Courts, where the question has so arisen, have practically unanimously so recognized. See, e.g., Gonzales v. Sheely, D. C. Ariz., 96 F. Supp. 1004; Wilson v. Board of Sup'rs of La. State University, etc., D.C. La., 92 F. Supp. 968; Johnson v. Board of Trustees of University of Kentucky, D. C., E. D. Ky., 83 F. Supp. 707; Davis v. Cook, D. C., N. D. Ga., 80 F. Supp. 443; Lopez v. Seccombe, D. C., S. D. Cal., 71 F. Supp. 769—to give but a few examples. See also Alston v. School Board of City of Norfolk, 4 Cir., 112 F. 2d 992, 997, 130 A.L.R. 1506; City of Birmingham v. Monk, 5 Cir., 185 F. 2d 859."

We doubt that the right of each man to be treated as an individual without reference to his race is a "joint or common" right within the meaning of subdivision (1) of Rule 23(a). It is an individual right. The principal and concurring opinions in *Cassell v. Texas*, 339 U.S. 282 (1950), a grand jury case, leave no doubt that the true function of the constitutional mandate is to remove race as a factor so persons may "be selected as individuals, on the basis of individual qualifications, and not as members of a race." 339 U.S. at p. 286. For this reason, the selection of a person because he *is* a Negro (for example, proportionate representation) is just as illegal as the rejection of him for the same reason. Racial discrimination *as a policy* may be attacked in class actions under Rule 23(a)(3) because, although the right is "several"—"there is a common question of law or fact affecting the several rights and a common relief is sought."—as Subdivision 3

provides. Racial discrimination may be equally attacked by a single individual to vindicate his own personal rights and to recover his personal damages.

Be that question as it may, the Court of Appeals here gave unqualified approval to the availability of Rule 23(a) to obtain injunction and declaratory judgment. The Court went further and approved the use of Rule 23(a) in damage suits provided evidence of damage sustained by individual members of the class be offered. The decisions cited by the court in its Footnote 7 (Petition, p. 22) all hold that the mechanics of collecting damages for separate individuals in different amounts is by intervention of the individuals and by proof of their respective damages. In this connection, it should be noted that it has been authoritatively held that the fact that different individuals in the class are entitled to different amounts of damage does not prevent the case from being one for "common relief" within the meaning of Rule 23(a), Subdivision 3. *McGrath v. Tadayusee* (C. A. 9, 1951), 186 F. 2d 766, 769-770, cert. den., 342 U.S. 832; *Oppenheimer v. F. J. Young & Co.* (C. A. 2, 1944), 144 F. 2d 387, 390; *Weeks v. Bareco Oil Co.* (C. A. 7, 1941), 125 F. 2d 84, 88. Regardless of whether in some imaginable case in the future, individual damages may be held collectible without the individual's intervention, the total absence of any evidence of individual monetary damage is sufficient to support this particular judgment and, indeed, to compel it.

For the foregoing reasons these respondents submit that theory advanced by petitioners is at odds with both the function and use of Rule 23(a). It is, likewise, contrary to the thrust of the constitutional principle involved and

to the implied statutory obligation which reflects the same policy. The case was rightly decided according to law. Notwithstanding this litigation casualty, the important principles which forbid racial discrimination are entirely unimpaired. Rule 23(a) remains entirely available for the vindication of rights in this class of cases.

Conclusion

WHEREFORE, these respondents pray that the petition for writ of certiorari be denied.

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Certificate of Service

This reply has been served upon all counsel in the case prior to the filing thereof and certificate of service has been duly lodged with the Clerk of the Court.

CHRIS DIXIE

APPENDIX

(From Respondents' Brief in the Court of Appeals)

FACTUAL SUMMARY

Since the establishment of the Port Arthur Refinery in 1901, the Company has had a complete unfettered right to select employees and prescribe their qualifications (Tr. 504). The Company never bargained away these rights (Tr. 505). Before the coming of the Union, the Company hired negro employees in the labor classification and white employees in the operating and mechanical jobs (Tr. 505).

The Union came into existence at the refinery in the year 1943 (Tr. 503) when the jointly certified Locals 23 and 254 took over their representation. In 1943 representatives of the negro local, exercising their statutory bargaining position, demanded that the jobs continue to be divided between the races as they theretofore existed. When Gulf refused to put such a provision into the contract, the representatives of Local 254 insisted that the same program be made a matter of agreed policy (Tr. 620-622). Thereafter, throughout the years the Workmen's Committee composed of 8 representatives from Local 23 and 4 representatives from Local 254 (Tr. 262) insisted that Gulf recognize this policy (Tr. 262). Plaintiff John Syres admitted that this was the policy of his group (Tr. 260). The record shows that Local 254 was insisting on this policy as late as November 1953 (Tr. 556). Gulf agreed informally (Tr. 554). Needless to say, the negroes utilized their position as jointly certified bargaining agent to accomplish this result.[1]

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[1] **In the matter of Gulf Oil Corporation** (Port Arthur Refinery) and **Oil Workers International Union, Locals 23 and 254**, Cause No. 16-R-557. 58 N.L.R.B. 978.

But old patterns break down. In 1953 the agitation began among some negro employees for a new system. As Appellants' brief shows, negotiations of December 23, 1953 led to an amalgamation of the two groups on January 5, 1954 (Appellants' Brief, page 3).

Answering the demand and acting by authority of Local 23, the defendant, E. R. McAdams, advised Gulf promptly thereafter that the Union "expected the company to fill all jobs according to the contract" (Tr. 557). The meaning of the demand, of course, was that the previous policy of Local 254 was reversed and that on any job opening in the operating and mechanical division the company would now receive and should recognize the bid of a negro employee on the basis of his seniority. The company's reaction was "what is the contract?" (Tr. 557); for it was now faced with a new interpretation (Tr. 558). On January 20, 1954, the company called in the union to request further clarification of the demand which, it remarked, changed the practice of 50 years, 10 of which had been under written contract (Tr. 869). The statement of the company to the union is Gulf's Exhibit 4 (Tr. 868-870) and is a document remarkable for its res gestae character. Following the reading of its formal statement, Gulf propounded 23 questions to the union, which are set out with the answers in the record at pages 872 to 880. A company witness testified that the union's answers meant "complete integration" (Tr. 558).

Gulf concluded to accept this principle (Tr. 556) and from there forward there was no problem except how to make it work (Tr. 566).

Gulf presented testimony that it concluded to go forward with the demand as made because it so happened that the labor contract at that time was open for negotiation and was effective on a day-to-day basis (Tr. 508). It knew that if the program did not work, it could promptly cancel the contract. This was a very important factor in its decision (Tr. 559, 520). Gulf believed that the bidding by the negroes would be selective as the negroes indicated (Tr. 560-561).

The new program was initiated as demanded, and over a period of four weeks two unexpected problems developed.

(1) A severe unrest developed in the plant among the white employees: Ugly racial signs appeared; there was tampering with personal property; bicycle tires were cut; truck keys were stolen; frigid personal relations developed in the plant (Tr. 518). There was an incident of physical contact between white and negro (Tr. 702). Negroes were handed the keys to high-pressure stills and invited to operate them (Tr. 702). There were threats; water was placed in gasoline tanks (Tr. 658). A union witness testified to his concern that the union itself was faltering (Tr. 658). The company developed the worst apprehensions concerning the safety of the plant (Tr. 518) and, in this, their sincerity was not doubted by the union (Tr. 659).

(2) Even deeper, however, was the company's concern with a fast developing problem of efficiency of operations (Tr. 659). It developed that the jobs were being filled by unqualified bidders (Tr. 586). An excessive burden was thereby thrust on supervision (Tr. 586). Under the new system the company's right of original selection establish-

ment of educational qualifications, and its pre-existing probationary period was lost (Tr. 586-588). Disqualification of employees and consequent arbitration were cumbersome and unsatisfactory (Tr. 586). The ratio of disqualifications rose sharply (Tr. 603-604).

For these reasons, Gulf discontinued the filling of vacancies acting on its own (Tr. 563).

As to the first problem, the unrest in the plant, the union did not surrender to this circumstance. It initiated an education program which was, in due course, successful (Tr. 708-709).

As to the second problem, the question of the qualifications of the employees, the problem was more complicated than the union imagined. Gulf had to be heard. Gulf demanded the time and opportunity for further study of the problem and advised the union that it was not willing to continue with the union's proposed system of January 195 and was not willing to go further than the contract of April 17, 1954 (Tr. 524). As far as the company was concerned the union would have to strike on that issue to compel the company to go further *that day* pending such further study (Tr. 524).

Gulf was willing, and the 1954 contract did provide, that 76 jobs theretofore in the operational-mechanical division would now be made available to the bid of negro employees (Tr. 582). On these jobs the company concluded that it could waive educational and other normal required qualifications (Tr. 582-583).

Although it is a matter of common knowledge, the enormous complexity of this modern refinery was proved in

this record (Tr. 470-481). For instance, there are more than 250 different job classifications in the bargaining unit (Tr. 158-164). In the exercise of its right of unrestricted selection of employees, Gulf has never hired an employee for his ability to perform a bottom job, except during the manpower shortage of World War II (Tr. 511). Gulf's selection of an employee has always rested upon his potential ability to handle a top job (Tr. 511) and to thereby assume responsibility for the safe operation of enormously valuable, but dangerous equipment (Tr. 510).

Employees have been hired at the bottom and progress upward through "lines of promotion" which requires an increasing demand on the employee's potential (Tr. 509-511). Therefore, minimum required qualifications for employees to enter the operating mechanical division are a high school education, and ability to pass certain standard intelligence tests (Tr. 525; 569) which are prepared for industry at large by professional concerns in this field (Tr. 569).

Furthermore, the company has always retained a six months probationary period for each new employee, during which an employee may be discharged without recourse (Tr. 512). This, of course, is an important selective process for the company. The union has tried to bargain a shorter probationary period but the company has stood adamant throughout the years (Tr. 587-588). Gulf has never agreed to a seniority clause based solely on length of service (Tr. 481). It is elementary that the seniority clause which it accepted in its bargaining with the union presupposes the right of selection, the quali-

fications, and the probationary period which go hand in hand with it.[2]

On the other hand, the employees in the labor department were not selected on that basis. Their qualifications were simply an ability to read no smoking signs (Tr. 476). The probationary period of these employees was never used to determine the potential of these employees to handle the operating mechanical division jobs (Tr. 588).

In taking the position that it did as to the April 1954 contract, the company not only waived qualifications on 76 jobs but it agreed to leave ten negro employees who had actually bid into and had remained in the operating mechanical division in their new line of promotion (Tr. 616). It gave full assurance that it was committed to the principle of integration and merely needed more time to study the problem (Tr. 580). The union proposed (Tr. 524) that the same 1954 contract include Stipulation 33 (Tr. 306) by which it was agreed that continuing meeting would be held concerning this racial problem (Tr.

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[2] See **Aeronautical Industrial Dist. Lodge, 727 v. Campbell**, 337 U.S. 521, 93 Law Ed. 1513, 69 Sup. Ct. 1287 (1949):

"All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as a unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining, 100-102 (1945); Harbison, Seniority Policies and Procedures as Developed through Collective Bargaining 1-10 (1941)."

306; 524). The company gave its agreement (Tr. 525) and the record shows that the continuing study was fruitful.

Gulf based its position squarely upon the fact that from the standpoint of qualifications of employees it could not operate on the high percentage of disqualifications which resulted from the union's proposal (Tr. 584). Since the ascending jobs in its lines of promotion required increasing brain power and education (Tr. 510) it could and would have been dangerous to continue with that system (Tr. 494). It thereby based itself squarely on relevant factors as defined by the Supreme Court in the *Steele* decision. No item of suspicion or question has been cast upon the employer from the standpoint of the motive with which these claims were advanced. The only question in this case, therefore, is whether the union was under duty to pay no attention to these relevant factors when it knew full well that Gulf was absolutely right (Tr. 722).

As stated, the parties specially reserved by Stipulation 33 the question of this racial problem for continuing study and solution. In these bargaining relationships, there is one pattern which has become commonplace. Each year the Company brings its money to the bargaining table for wage increases and other benefits, and it expects in return a contractual agreement of some duration, including especially a no-strike clause. The execution of the contract, itself, is the desirable policy of the National Labor Relations Act, 29 *U.S.C.A.* 158(a)(5); 29 *U.S.C.A.* 158(b)(3). In mature bargaining, many matters are solved and agreed upon during the course of the contract. Indeed, in some instances, there is a continuing obligation to bargain during the course of the contract on matters not

settled by the contract itself. *The Jacobs Manufacturing Co.*, 94 N.L.R.B. 1214 (1951), Affm'd. *N.L.R.B. v. Jacobs Manufacturing Co.*, 196 Fed. 2d 680 (C.A. 2, 1952).

In this case, since the contract brought the traditional wage increases to all, including all negro employees, there was no reason why the other issues of the bargaining could not be settled while the racial problem was under study. Conversely, it cripples the congressional policy to say that nothing may be settled until everything is settled.

The record shows that after the 1954 contract was duly ratified Local 23, within ten days, contacted Local 284 for a meeting to find further solution to the problem (Tr. 661). This was done before notice of this litigation or the employment of plaintiffs' counsel in this case (Tr. 663). Such a meeting was held on May 14, 1954 to explore the problem and was adjourned on the basis that Local 284 would present a proposal to Local 23 before June 1, 1954 (Tr. 663-664).

In the meantime counsel for Plaintiffs here had notified Local 23 of his representation "for the purpose of affecting a change" in the seniority provisions (Tr. 840). On May 11 the Local 23 responded that it would answer as soon as possible and that the attorney's letter was being considered (Tr. 792). On May 17 the attorney responded, thanking Local 23 for its prompt reply and its assurances and stressing the importance of time (Tr. 792-793). On May 19, 1954 Local 23 wrote the attorney that a meeting between the two locals had been held on May 14, 1954 and that it recessed on the basis that Local 284 would present a proposal before June 1 (Tr. 793-794). Local 23 never received the promised proposal (Tr. 644), but was served instead with this law suit (Tr. 665) which

has been described in this record by Plaintiffs as a "part of the strategy" of the Plaintiff group (Tr. 768). As to the proposed meetings between the locals, 18 members of the Executive Board of Local 23 appeared but only one person from 254 (Tr. 665). This required a rescheduling of the meeting, but the Plaintiff John Syres, soon advised Local 23 that such a meeting was "untimely" and that Local 254 would not meet (Tr. 636).

In September, 1954 Local 23 espoused and submitted a proposal to solve the problem which is known in this record as the Aiken Plan (Tr. 794-796; 708). This was submitted to both the Company and Local 254 and was rejected by both (Tr. 709; 848-849).

On November 13, 1954 Local 23 wrote the Plaintiff Syres that his group had not been willing to meet to find a solution, that Local 23 is willing to meet, that Syres' people had declined to give help "and had left it up to us to find the answer under penalty of being sued for enormous sums of money if we do not immediately solve every problem which has hung over since the Civil War" (842-84).

On December 28, 1954, Local 23 wrote to Syres concerning the creation of Committees to meet "in an effort to reach some understanding that could be used as a satisfactory agreement" (Tr. 834).

Other documents in the record show meetings of April 11, 1955 (Tr. 844), May 10, 1955 (Tr. 845), and May 16, 1955 (Tr. 847).

The record also shows a meeting of October 5, 1955 between representatives of the two locals in which Local 23 advised 254 that the answer of the Company to the Union's

proposals would immediately be made known to Local 254 (Tr. 848-849).

On November 29, 1955 Local 23 transmitted to Local 254 the company's counter-proposal and requested a meeting with representatives of Local 254 (Tr. 850). This letter was referred to the Gulf group of Local 254 (Tr. 851) and on December 9, 1955 Local 23 was advised that the Local 254 Committee was ready to meet (Tr. 852).

On December 28, 1955, however, Local 254 wrote Local 23 that "we find we cannot accept a position without jeopardizing our entire position. We feel that the negotiations are entrusted to the Committee and you will do your very best for all concerned" (Tr. 853).

In 1955, Local 23 also requested Local 254 to create a committee for the purpose of bargaining with the Company (Tr. 308). By February 1956 the two Locals had worked up a satisfactory plan which was submitted to the company (Tr. 363). The first version of this Plan appears at Transcript 854 and the revised version at Transcript 856. These Plan were first drawn up by the attorney for Local 23 (Tr. 757) and were left with Local 254 for the approval of its membership and their attorney (Tr. 758). Local 254 did adopt the Plan (Tr. 758) and later the Local 254 committee met and bargained with the company concerning the solution to the problem.

There is an extensive description by a company witness of the bargaining with the company on this problem beginning at Transcript page 572. The union made the first proposal which was the Aiken Plan (Tr. 572, which the Company rejected (Tr. 573). Meantime, under Stipulation 33, the company was studying the solutions by competitors and was meeting with the union (Tr. 573). In

due course the company presented its proposal (Tr. 573-574), which was not well received by the unions because the company's proposal contained the principle of two starting jobs, this being opposed by Local 254 (Tr. 574). Attended by both racial groups, the bargaining continued with the negroes urging their views freely (Rec. 575). The compromise of all the conflicting views is described at Transcript 576, 577 and 578. During these negotiations the negro committee walked out (Tr. 578). The final solution to the problem was to give to the negro employee the right to bid in jobs in the operating mechanical division, provided he has the same high school education and passes exactly the same tests as employees of any race, thereby satisfying the company's demands on qualifications (Tr. 580). The company granted the negroes' demand to maintain only one starting job (Tr. 577). The significance of the arrangement is that the company loses its former right of original selection and its six months probationary period but at least obtains equal educational and mental qualifications.

As to why such a system had not been set up in 1954, the company witness testified that the company did not know how to go about it, the answer had not been thought out, and there was no prior experience in the industry (Tr. 580-581).

Local 23 introduced evidence that during these negotiations, the negro representatives were viciously pressured by others of their group not to negotiate (Tr. 743-744). The plaintiff Syres testified in this connection that three named persons were duly created by Local 254 to negotiate (Tr. 755), that they later resigned (Tr. 355), that it could be that there is a division of opinion within Local 254, which he would not deny (Tr. 756), that Syres

thought the Gulf group should not have ratified the proposals which were submitted to the company (Tr. 758), and that the jointly agreed plan was not understood by the duly elected committee members (Tr. 759).

The purpose of summarizing this evidence for the benefit of the Court is to show that Stipulation 33 meant exactly what it said; that Local 23 turned to the task at hand within 10 days of the April 17, 1954 contract and did not rest until the solution was found; that the company for its part carried out its promises fairly and demanded only due consideration of relevant factors necessary to the operation of its business; that the plaintiff Syres, as well as Local 254, obstructed progress by refusing to meet in the beginning, by refusing to lend their economic and mental powers to the problem, by refusing to take a position in the bargaining, and by scuttling the efforts of a duly authorized committee of Local 254 to bargain to a successful solution.

Returning for the moment to the demand which the union made upon the company in January 1954, it will be observed from the foregoing that the significance of the union's proposal was that the company would now be required to give up its right of selection, its educational and mental qualification requirements and its probationary period. On the question of qualifications, plaintiffs were careful to point out in the trial court below that they do not question or attack these standard qualifications. Plaintiffs' counsel stated: "But we have not argued against those qualifications as to the negroes. We only say they should have been applied the same to them as to the whites" (Tr. 589). The plaintiff, John Syres, explicitly testified to the same effect (Tr. 313-314). He explicitly denied any authority from his group or intention to seek to break

down the company's standard educational and other qualifications. The record shows that of the approximated 900 negroes in the plant (Tr. 561) only "a few" have high school education (Tr. 615). Of these not all would qualify according to the company (Tr. 615). The record shows that under the 1956 contract the company posted 20 jobs for pipe fitter helpers and received bids from 96 negroes. Of these 96, 34 presented high school diploma or the equivalent (Tr. 570). Twenty-nine of these had been tested and 5 made a passing grade (Tr. 570). The record also shows that out of 67 persons contacted during the above episode, the company obtained an ultimate qualification of five persons (Tr. 581). The company recently hired 53 negroes of which 24 were high school graduates, but only one passed the tests.

RULE 23(a) F.R.C.P.

Rule 23. Class Actions—(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.